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IN THE

Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DONNA COLTHARP
SARAH GANNETT
DANIEL KAPLAN
Co Chairs
BRETT SWEITZER
Member
Amicus Committee
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

AMY BARON-EVANS
Counsel of Record
JENNIFER NILES COFFIN
FEDERAL DEFENDERS
NATIONAL SENTENCING RESOURCE COUNSEL
51 Sleeper St., 5th Floor
Boston, MA 02210
(617) 391-2253
abaronevans@gmail.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the residual clause in U.S.S.G. § 4B1.2(a)(2) is void for vagueness in light of *Johnson*, thereby rendering Petitioner's challenge to his career offender sentence cognizable under 28 U.S.C. § 2255(a).

2. Whether *Johnson* has retroactive effect in this collateral proceeding.

3. Whether Petitioner's conviction for unlawful possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, qualifies as a "crime of violence" after *Johnson*.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States (not including the Defender representing the petitioner in this case), have offices in 91 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose members are attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici* represent tens of thousands of individuals in federal court each year, including many who were previously sentenced under the residual clause of the Career Offender Guideline. *Amici* have particular expertise and interest in the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici write to place the issues in this case in broader context by discussing the history of the Career Offender Guideline, its impact on those to whom it has been applied and who remain in prison, and the implications of a ruling in Petitioner's favor on them and the federal criminal justice system.

Of the handful of most extreme punishments under federal law, the Career Offender Guideline has been applied most broadly. The courts have applied the

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[1] The parties to the case, and *amicus* appointed by the Court, have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. Sup. Ct. R. 37.3(a). No counsel for a party authored any part of this brief, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

guideline expansively to reach relatively minor offenses under the vague language of the residual clause. The Commission has defined its predicates to reach conduct well beyond that specified or warranted by the congressional directive upon which it is based. For these reasons and others discussed below, the Career Offender Guideline has a severe disproportionate impact on African Americans, and fails to promote any purpose of sentencing in most cases in which it has been applied. At the same time, retroactive relief under ameliorating guideline amendments and changes in law has been foreclosed to many career offenders serving harsh prison terms. As a result of the extreme severity and sweeping breadth of the Career Offender Guideline, and the unavailability of relief, career offenders comprise over eleven percent of the federal prison population even though they are only about three percent of defendants sentenced each year.

For the persuasive reasons argued by Petitioner, *amici* urge the Court to hold that the residual clause in the Career Offender Guideline is void for vagueness in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), that *Johnson* applies retroactively to Career Offender Guidelines cases on collateral review, and that offenses listed in the guideline's commentary that conflict with its text absent the residual clause are invalid. Doing so will not unduly burden the courts. Now that the statute of limitations has run and motions have been filed, *amici* are able to estimate that at most 6,000 prisoners who were sentenced under the Career Offender Guideline are seeking retroactive relief under *Johnson*.[2]

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[2] App. at 9a-11a.

ARGUMENT

I. The Career Offender Guideline Creates a Particularly Severe Punishment That Has Been Applied To An Overly Broad Category of Defendants.

The Career Offender Guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). Because Congress mandated that the Sentencing Commission specify a term of imprisonment at or near the statutory maximum, 28 U.S.C. § 994(h), the Commission's one attempt to ameliorate the severity of the guideline was held invalid. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997). At the same time, the Commission has expanded the reach of the guideline beyond that required or warranted by § 994(h)'s plain language, and the courts have applied the guideline broadly under the vague language of the residual clause. Career offenders sentenced to harsh prison terms based on minor offenses have been unable to get relief under ameliorating guideline amendments or changes in law. While career offenders are just over three percent of defendants sentenced each year, they comprise over 11 percent of the federal prison population.[3]

A. The Guideline Is Harsh.

Congress mandated that the Commission "specify a sentence to a term of imprisonment at or near the maximum term authorized" for "categories of defendants" convicted for at least the third time of a "felony that is" a "crime of violence" or "an offense

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[3] U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 24 (2016).

described in" particular federal statutes prohibiting drug trafficking. *See* 28 U.S.C. § 994(h). The Commission implemented the level of punishment required by the directive by tying the offense level to the statutory maximum for the instant offense of conviction and automatically placing the defendant in Criminal History Category VI.[4]

Several additional features make being categorized as a career offender particularly harsh. Although the guideline regularly applies to low-level federal offenders with a criminal history produced by addiction and disadvantage,[5] the offense level may not be reduced for a minor or minimal role in the offense, and the Commission limited "departures" to one criminal history category for career offenders whose placement in the highest criminal history category overstates the

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[4] U.S.S.G. §4B1.1(a)-(b).

[5] *See, e.g.*, *United States v. Preacely*, 628 F.3d 72, 83-84 (2d Cir. 2010) (Lynch, J., concurring) (defendant's "sad, addicted life" produced a "history of multiple (if mostly minor) criminal convictions (almost exclusively tied to the possession and sale of narcotics)," so that "the only 'career' he ever had seems to have been selling drugs" and "earn[ing] an extraordinary sentence for a relatively mundane offense"); *United States v. Gavin*, 2008 WL 4418932 (E.D. Ark. Sept. 29, 2008) ("[D]efendant's criminal history [consisting of two crimes of violence] reflects criminal behavior consistent with a vagrant and substance abuser as opposed to a violent offender."); *United States v. Fernandez*, 436 F.Supp.2d 983, 990 (E.D. Wis. 2006) ("[T]he broad language will often sweep within the career offender guideline defendants with relatively minor records," such as fleeing, walk-away escape and car theft, "though they are likely not what Congress had in mind."); *United States v. Newhouse*, 919 F.Supp.2d 955, 991 (N.D. Iowa 2013) (defendant was "a long-term, chronic drug addict whose entire criminal history is tied to her addiction," whose "height of [] involvement in the drug trade has been as a low-level pill smurfer").

seriousness of their criminal history or their likelihood of re-offense.[6]

Moreover, the Career Offender Guideline not only *was* mandatory for over seventeen years, it was treated as mandatory long after *United States v. Booker*, 543 U.S. 220 (2005), and even after *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009). Four circuits expressly prohibited district courts from varying from the Career Offender range based on a policy disagreement,[7] and even in other circuits, some

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[6] *See* U.S.S.G. §4A1.3(b)(3)(A), p.s.; *id.* app. C, amend. 651 (Oct. 27, 2003).

[7] *See United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (holding that district court was "not free to ignore" Congress's policy judgment in § 994(h)); *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006) ("To the extent that the sentence imposed by the district court rests on [an outright] rejection of congressional policy with respect to repeat drug offenders, it is subject to reversal on that basis alone."); *United States v. Posey*, 294 F. App'x 765 (4th Cir. 2008) (later recognizing district courts may disagree with the career offender guideline); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008) (district court erred by "impos[ing] his own policy determination [and] supplant[ing] that of the Sentencing Commission (and Congress)"), *vacated by* 560 F.3d 619, 619-20 (6th Cir. 2009) (appeal voluntarily dismissed by the government); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (later holding that "district court may lawfully conclude that the policies underlying the career-offender provisions yield a sentence 'greater than necessary' to serve the objectives of sentencing"); *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009) (prohibiting disagreement with career offender guideline), *overruled by United States v. Corner*, 598 F.3d 411, 415-16 (7th Cir. 2010) (en banc); *United States v. Williams*, 456 F.3d 1353, 1369-70 (11th Cir. 2006) (holding district court erred in mitigating a sentence based on its disagreement with "Congress's policy of targeting recidivist drug offenders for more severe punishment"); *United States v.*

district courts failed to recognize that the guideline was advisory for many years.[8]

For 46.3% of defendants sentenced as career offenders in 2014, the Career Offender Guideline increased the average guideline minimum by 260% (from 70 to 188 months); for 32.6%, it increased the average guideline minimum by 183% (from 92 to 168 months); for another 12.4%, it increased the average guideline minimum by about 25%.[9] And the Career Offender Guideline "exert[ed] controlling influence on the sentence[s]" imposed.[10] The average sentence imposed on career offenders was *2.3 times* that imposed on non-career offenders convicted of the same offense types.[11]

Moreover, it is exceedingly rare for a non-career offender to receive a sentence as severe as a career offender. Among career offender and non-career offenders convicted of the same offense types in 2014,

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Vazquez, 558 F.3d 1224, 1227-28 & n.2 (11th Cir. 2009) (reaffirming *Williams* after *Spears*), *vacated by Vazquez v. United States*, 558 U.S. 1144 (2010) (remanding for further consideration in light of Solicitor General's position).

[8] At sentencing in 2014, the district court "refus[ed] to vary downwardly because there was no 'Fifth Circuit guidance' related to variances when a defendant is subject to the career-offender provision." *United States v. Clay*, 787 F.3d 328, 330 (5th Cir. 2015). The Fifth Circuit held for the first time in 2015 that the "district court's sentencing discretion is no more burdened when a defendant is characterized as a career offender under §4B1.1 than it would be in other sentencing decisions." *Id.* at 331.

[9] *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offender* (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf.

[10] *Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013).

[11] App. at 2a.

only 1.2 percent of non-career offenders received a sentence as high as the guideline minimum for career offenders.[12] For firearms offenses, it was only 0.9 percent.[13]

At the same time, retroactive relief is not available for career offenders for a subsequent reduction in the guideline range for the underlying offense, and the Commission has prohibited retroactive relief even when the court departed or varied based on that range.[14] The Commission's prohibition overruled a majority of the courts of appeals,[15] and "closed the door of lenity on anyone who qualified for the career offender provision, regardless of how harsh the result."[16] And while the Commission recently made ameliorating changes to the definition of "crime of violence," it did not make those changes retroactive for reasons that would appear to preclude retroactivity for any narrowing of career offender predicates.[17]

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[12] *Id.* at 6a.

[13] *Id.*

[14] *See* U.S.S.G. §1B1.1, comment. (n.1(A)).

[15] *See United States v. Cardosa*, 606 F.3d 16, 21 (1st Cir. 2010); *United States v. Rivera*, 662 F.3d 166, 174, 177 (2d Cir. 2011); *United States v. McGee*, 553 F.3d 225, 227, 230 (2d Cir. 2009); *United States v. Flemming*, 617 F.3d 252, 259-60, 260-64 (3d Cir. 2010); *United States v. Munn*, 595 F.3d 183, 189-95 (4th Cir. 2010); *United States v. Wesson*, 583 F.3d 728, 732 (9th Cir. 2009); *United States v. Moore*, 541 F.3d 1323, 1329-30 (11th Cir. 2008).

[16] *United States v. Barr*, 132 F.Supp.3d 290, 295 (D.R.I. 2015).

[17] It was "difficult, if not impossible," to estimate the impact because Commission data does not include which criminal history events were used as predicates or under which definition they qualified. Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 4 (Jan. 8, 2016),

B. Its Reach Is Broad.

The Commission has unnecessarily broadened the scope of the Career Offender Guideline, and the courts have applied it expansively under the vague language of the residual clause.

1. Controlled Substance Offenses

The Commission defined "controlled substance offense" more broadly than required or warranted. Congress directed the Commission to specify a term of imprisonment at or near the maximum for "categories of defendants" convicted of a "felony that *is* an offense described in" 21 U.S.C. §§ 841, 952(a), 955, 959, and 46 U.S.C. § 70503, and who were previously convicted of two or more prior "felonies, each of which *is*" one of those same federal offenses.[18] Nonetheless, the Commission included state drug offenses and a number of less serious federal drug offenses than those specified.[19] If Congress intended to include state drug offenses, it knew how to say so, *see*, *e.g.*, 18 U.S.C. § 924(e)(2)(A)(i) & (ii); 21 U.S.C. § 802(44); 8 U.S.C.

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http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf.

[18] 28 U.S.C. § 994(h)(1)(B), (2)(B) (emphasis added).

[19] The following state and federal offenses were added to the drug offenses specified in § 994(h) from 1987 through 1997, and remain today: any state offense punishable by more than one year; aiding and abetting, attempt, conspiracy; "[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance," 21 U.S.C. § 841(c)(1); "[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance," 21 U.S.C. § 843(a)(6); "[m]aintaining any place for the purpose of facilitating a controlled substance offense," 21 U.S.C. § 856; and "[u]sing a communications facility in committing, causing or facilitating a drug offense," 21 U.S.C. § 843(b). *See* U.S.S.G. §4B1.2(b) & comment. (n.1) (Supp. 2016).

§ 1101(a)(43),[20] and "the precision with which § 994(h) includes certain [federal] drug offenses but excludes others indicates that the omission of § 846 [conspiracy] was no oversight."[21]

As a result of the Commission's expansion on Congress's directive, the Career Offender Guideline applies to a great many low-level drug sellers.[22] Indeed, drug trafficking is the most frequent prior conviction in career offender cases,[23] and is the instant

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[20] The Court recently held that when 8 U.S.C. § 1101(a)(43) states that "[t]he term 'aggravated felony' means an offense described in" a particular federal statute, it applies to violations of state statutes with the same substantive elements because the penultimat sentence of § 1101(a)(43) expressly says so. *See Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016). The career offender directive says no such thing, and moreover, says that the defendant must be convicted of a felony that "*is* an offense described in" the specified drug statutes.

[21] *United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009).

[22] *See, e.g.*, *United States v. Moreland*, 568 F.Supp.2d 674, 687 (S.D. W. Va. 2008) (noting that distribution of one marijuana cigarette in 1992 and 6.92 g. crack in 1996 "hardly constitute the type and pattern of offenses that would indicate Mr. Moreland has made a career out of drug trafficking," and entire amount distributed in his lifetime "would rattle around in a matchbox").

[23] While the Commission does not collect data regarding the number or type of career offender predicates, a recent compilation of "criminal history events" of any kind for a sample of career offenders sentenced in 2014 showed that drug trafficking far outnumbered offenses that could be a "crime of violence" under any legal definition before or after *Johnson* or under the Commission's recently-amended definition. *See* U.S. Sent'g Comm'n, *Public Data Briefing: "Crime of Violence" and Related Issues* at slides 17, 19, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

offense in nearly three quarters of cases.[24] In response to decisions holding that it had impermissibly exceeded the terms of § 994(h),[25] the Commission amended the commentary to state that it had relied on its general amendment authority to "modif[y] this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid 'unwarranted sentencing disparities.'"[26] But the Commission later found that the Career Offender Guideline is *inappropriately* severe and creates *unwarranted disparities* for defendants who qualify based on drug crimes.[27]

2. Crimes of Violence

Congress had in mind for the Career Offender Guideline "repeat violent offenders,"[28] "a relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets," *i.e.*,

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[24] *See* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl. 22 (instant offense was drug trafficking for 73% of career offenders in 2014); *Career Offender Report*, *supra* note 3, at 24 (instant offense was drug trafficking for 74.1%, and selling drugs in a protected location for 1.6%, of career offenders in 2014).

[25] *See United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994), *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), *vacated*, 65 F.3d 691 (8th Cir. 1995) (en banc).

[26] U.S.S.G. app. C, amend. 528 (Nov. 1, 1995); *id.* §4B1.1, comment. (backg'd) (Nov. 1, 1995).

[27] *See* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 133-34 (2004).

[28] S. Rep. No. 98-225, at 175 (1983).

those "who stab, shoot, mug, and rob."[29] But given the "hopeless indeterminacy" of the residual clause and its dependence on a "judge-imagined abstraction," *Johnson*, 135 S. Ct. at 2557-58, the courts interpreted the clause expansively. Contributing to the problem, the Commission issued commentary removing the link between the residual clause and the enumerated offenses.[30] Thus, defendants were classified as career offenders under the residual clause based on "crimes of violence" that involved no injury or serious risk of injury and no violent or aggressive conduct.[31]

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[29] 128 Cong. Rec. 26,517-18 (Sept. 30, 1982) (statement of Sen. Kennedy).

[30] From November 1, 1989 until August 1, 2016, the commentary stated that "crime of violence" includes offenses in which "the conduct set forth in the count of conviction by its nature, presented a serious potential risk of physical injury to another." U.S.S.G. §4B1.2, comment. (n.2) (2015). Courts relied on this commentary to hold that "conduct that presents a serious potential risk of physical injury to another" need not be similar in kind or degree of risk to the enumerated offenses. *See, e.g.*, *United States v. Parson*, 955 F.2d 858, 874-75 (3d Cir. 1992). When the problem was brought to the Commission's attention, *id.*, it acknowledged that the commentary had broadened the definition, such that "crimes not traditionally considered crimes of violence might qualify as a crime of violence under §4B1.2, but would not qualify as a crime of violence under § 924(e)," and proposed to fix it. *See* 58 Fed. Reg. 67,522, 67,533 (Dec. 21, 1993). With no explanation, it didn't.

[31] *See, e.g.*, *United States v. Moore*, 420 F.3d 1218, 1220-22 (10th Cir. 2005) (driving under the influence); *Parson*, 955 F.2d at 870-71 (reckless endangerment); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992) (conspiracy to break and enter a non-dwelling); *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005) (fleeing and eluding); *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005) (possession of short-barreled shotgun); *United States v. Sun Bear*, 307 F.3d 747, 752 (8th Cir. 2002) (attempted vehicle theft).

In *Begay*, the Court narrowed the breadth of the residual clause when it held that driving under the influence is not a "violent felony" because it does not involve the "purposeful, violent, and aggressive conduct" that the enumerated offenses "typically involve," *Begay v. United States*, 553 U.S. 137, 144-45 (2008). The Court then concluded in *Chambers* that an escape conviction based on a failure to report for service of sentence did not satisfy the ACCA's residual clause as interpreted by *Begay*, relying on a Commission report finding no failure to report cases involving violence. *Chambers v. United States*, 555 U.S. 122, 128-29 (2009).

Courts thereafter applied *Begay* to both the ACCA and the Career Offender Guideline to hold that many offenses previously held to be "crimes of violence" were not—including driving while intoxicated,[32] auto theft and auto tampering,[33] attempted vehicle theft,[34] non-residential burglary,[35] negligent burglary,[36] reckless assault without actual force,[37] spitting on a police officer[38] or a pregnant woman,[39] assault defined to include "unlawful touching, whether violent or

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[32] *United States v. Tiger*, 538 F.3d 1297 (10th Cir. 2008), *overruling United States v. Moore*, 420 F.3d 1218 (10th Cir. 2005).

[33] *United States v. Williams*, 537 F.3d 969 (8th Cir. 2008).

[34] *Sun Bear v. United States*, 611 F.3d 925, 928 (8th Cir. 2010), *vacated on other grounds*, 644 F.3d 700 (8th Cir. 2011) (en banc).

[35] *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008) (en banc).

[36] *United States v. Martin*, 753 F.3d 485, 493 (4th Cir. 2014).

[37] *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010).

[38] *United States v. Carthorne*, 726 F.3d 503, 508 (4th Cir. 2013).

[39] *United States v. Evans*, 576 F.3d 766 (7th Cir. 2009).

nonviolent and no matter how slight" and encompassing reckless conduct,[40] failing to stop for a blue light,[41] statutory rape involving two teenagers,[42] sexual misconduct that may be committed by one teenager "kissing or fondling" another teenager,[43] starting a fire without intent to set fire to, burn, or damage property,[44] child endangerment under a statute allowing conviction for such passive behavior as leaving children unattended near an unfenced pond or with a physically abusive spouse,[45] involuntary manslaughter involving an accidental shooting of a close friend,[46] negligent vehicular homicide,[47] walkaway escape,[48] carrying a concealed weapon,[49] non-overt act conspiracy,[50] reckless endangerment,[51] and opposing or obstructing a police officer.[52]

But *Begay* and *Chambers* could not cure the intractable vagueness of the residual clause. Courts were still required to imagine in the abstract the degree of

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[40] *United States v. Royal*, 731 F.3d 333, 342 (4th Cir. 2013).

[41] *United States v. Rivers*, 595 F.3d 558 (4th Cir. 2010).

[42] *Spencer v. United States*, 773 F.3d 1132, 1136 (11th Cir. 2014) (en banc).

[43] *United States v. Goodpasture*, 595 F.3d 670 (7th Cir. 2010).

[44] *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013).

[45] *United States v. Wilson*, 562 F.3d 965, 967 (8th Cir. 2009).

[46] *United States v. Peterson*, 629 F.3d 432, 434 (4th Cir. 2011).

[47] *United States v. Herrick*, 545 F.3d 53, 60 (1st Cir. 2008).

[48] *E.g.*, *United States v. Ford*, 560 F.3d 420 (6th Cir. 2009).

[49] *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

[50] *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010).

[51] *United States v. High*, 576 F.3d 429, 430 (7th Cir. 2009); *United States v. Baker*, 559 F.3d 443, 454 (6th Cir. 2009).

[52] *United States v. Mosley*, 575 F.3d 603 (6th Cir. 2009).

risk posed by the "ordinary case," *Johnson*, 135 S. Ct. at 2559, and in doing so also followed the "ad hoc test[s]" from *James* and *Sykes*, *id.* at 2558—tests that themselves undermined any hope of tenable results.

In *James*, the Court held that attempted burglary is a violent felony under the ACCA because, it said, the risk posed by attempted burglary "is comparable" to the risk posed by completed burglary, its "closest analog" of the enumerated offenses. 550 U.S. 192, 203-04 (2007). The Court supported its conclusion with suppositions regarding the typical risk posed and with the assumption—mistaken, it turns out—that the Commission included attempt crimes in the Career Offender Guideline "based on [its] review of empirical sentencing data." *Id.* at 206 (citing §4B1.2, comment. (n.1)).[53]

In *Sykes*, the Court relied on "commonsense" that vehicular flight is a violent felony under the ACCA's residual clause, 564 U.S. 1, 10 (2011), even though the statute "covered everything from provoking a high-speed car chase to failing to stop immediately after seeing a police officer." *Johnson*, 135 S. Ct. at 2558-59. In the process, the Court suggested that courts had been overreading *Begay*'s "purposeful, violent and aggressive" test, *Sykes*, 564 U.S. at 12-13, which precipitated backtracking in some courts.

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[53] The Commission has now deleted "burglary of a dwelling" from the career offender guideline based on extensive empirical evidence demonstrating that "burglary offenses rarely result in physical violence." U.S.S.G. §4B1.2(a)(2) (Supp. 2016) (Reason for Amendment). Going forward, a prior burglary conviction may be used solely as a reason for upward departure, and even then only in the unusual case in which it involved physical injury. *Id.* §4B1.2 comment. (n.4).

The result was "pervasive disagreement about the nature of the inquiry [the court] is supposed to conduct and the kinds of factors [the court] is supposed to consider," *id.* at 2560, with courts free to guide their imaginations by mistaken assumptions, non-record statistics, Google searches, or "gut instinct," *id.* at 2557-58. Offenses that continued to qualify as "crimes of violence" after *Begay* and *Chambers* include pick-pocketing,[54] attempted larceny from a person,[55] theft of a firearm,[56] purse-snatching,[57] simple assault,[58] resisting arrest,[59] misdemeanor resisting arrest,[60] resisting arrest by fleeing,[61] simple vehicular flight encompassing failure to stop with no high speed,[62] trespass of habitation by stealth or deception,[63] trespass of a

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[54] *United States v. Jarmon*, 596 F.3d 228 (4th Cir. 2010) (statute criminalizing theft of over $5 in money or goods from another person).

[55] *United States v. Taylor*, 696 F.3d 628, 631 (6th Cir. 2012); *see also United States v. Alderman*, 601 F.3d 949, 953 (9th Cir. 2010) (theft from a person).

[56] *United States v. Schmidt*, 623 F.3d 257, 264 (5th Cir. 2010).

[57] *United States v. Hollins*, 514 F. App'x 264 (3d Cir. 2013); *see also United States v. Welch*, 683 F.3d 1304, 1313 (11th Cir. 2012) (robbery by sudden snatching).

[58] *United States v. Johnson*, 587 F.3d 203 (3d Cir. 2009).

[59] *United States v. Jenkins*, 631 F.3d 680 (4th Cir. 2011).

[60] *United States v. Stinson*, 592 F.3d 460 (3d Cir. 2010); *United States v. Almenas*, 553 F.3d 27, 34-35 (1st Cir. 2009).

[61] *United States v. Ellis*, 815 F.3d 419 (8th Cir. 2016).

[62] *United States v. Petite*, 703 F.3d 1290 (11th Cir. 2013).

[63] *United States v. Skipper*, 552 F.3d 489, 492-93 (6th Cir. 2009).

dwelling,[64] attempted burglary encompassing possession of burglary tools,[65] attempted burglary encompassing attempt to remove an air conditioner,[66] criminal trespass,[67] entering a public telephone booth to steal change from coin boxes,[68] organizing, taking part in, or inciting a hunger strike or other organized disobedience,[69] and fleeing by vehicle, including a bicycle, while obeying all traffic laws.[70]

Meanwhile, conflict reigned, as demonstrated by the disarray regarding whether mere possession of a firearm described in 26 U.S.C. § 5845(a) poses the requisite risk. In 2004, the Commission amended the guideline commentary to except unlawful possession of a firearm described in 26 U.S.C. § 5845(a) from the firearm-possession exclusion, because a number of courts at the time had held that possession of such a firearm satisfied the residual clause.[71] Thereafter, a number of courts of appeals held that it did *not* satisfy the identical residual clause in the ACCA. *See United States v. Miller*, 721 F.3d 435, 440 (7th Cir. 2013); *United States v. Amos*, 501 F.3d 524, 529 (6th Cir.

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[64] *United States v. Corner*, 588 F.3d 1130, 1134 (7th Cir. 2009), *overruled on other grounds*, 598 F.3d 411 (7th Cir. 2010) (en banc).

[65] *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010).

[66] *United States v. Ghoston*, 530 F. App'x 468 (6th Cir. 2013) (relying on *United States v. Bureau*, 52 F.3d 584 (6th Cir. 1995).

[67] *United States v. Goodwin*, 625 F. App'x 840 (10th Cir. 2015).

[68] *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc).

[69] *United States v. Johnson*, 616 F.3d 85, 88 (2d Cir. 2010).

[70] *United States v. Hornyak*, 805 F.3d 196, 198 (5th Cir. 2015).

[71] U.S.S.G. app. C, amend. 674 (Nov. 1, 2004); *id.* §4B1.2, comment. (n.1) (Nov. 1, 2004).

2007); *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010); *United States v. Haste*, 292 F App'x 249, 250 (4th Cir. 2008). Others, such as the lower court in *Johnson*, disagreed.

C. Prisoners Sentenced To Harsh Prison Terms Based on Relatively Minor Offenses Have Been Unable to Get Relief.

The many people sentenced as career offenders based on minor crimes even after *Begay* and *Chambers* had no prospect of relief. Relief was foreclosed to many who would not have been sentenced as career offenders had they been sentenced after *Begay* and *Chambers*.[72] And many would not be career offenders under the Commission's new definition, which deletes the residual clause, eliminates "burglary of a dwelling," and narrows the definition of statutory rape and child sex abuse,[73] but the Commission did not make those changes retroactive.

II. The Career Offender Guideline Has An Unwarranted Adverse Impact on African Americans.

In the late 1980s, a wide gap opened up between the sentences of black defendants and those of other

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[72] Non-constitutional errors have been held not to present a cognizable miscarriage of justice in advisory guidelines cases, *see United States v. Foote*, 784 F.3d 931, 937-39 (4th Cir. 2015); *Spencer v. United States*, 773 F.3d 1132, 1144 (11th Cir. 2014); *Hawkins v. United States*, 706 F.3d 820, 822-24 (7th Cir. 2013), and in one circuit even in mandatory guidelines cases, *Sun Bear v. United States*, 644 F.3d 700, 704-06 (8th Cir. 2011) (en banc). *But see Narvaez v. United States*, 674 F.3d 621, 627-30 (7th Cir. 2011); *United States v. Doe*, 810 F.3d 132, 159-60 (3d Cir. 2015).

[73] U.S.S.G. §4B1.2(a)(2) & comment. (n.1) (Supp. 2016).

races.[74] The gap resulted from new statutes and guidelines, including the Career Offender Guideline, "that have a disproportionate impact on" black defendants but "serve no clear sentencing purpose."[75] As the Commission itself has said, "if a sentencing rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group."[76]

From 1992 through 2014, black defendants comprised 32.7 percent of defendants convicted of the eight most common instant offense types eligible for career offender status, but they were 61.6 percent of such defendants sentenced as career offenders, and they are 65.8 percent of those defendants who likely remain in prison.[77] This severe disparity is unnecessary and unfair. It arises in large part from police practices that put African Americans at greater risk of conviction than similarly situated whites, and it promotes no relevant sentencing purpose even for convictions that do *not* result from unequal law enforcement.

A. Many Career Offender Predicates Reflect Disparate Policing Practices.

Though African Americans have been convicted of more career offender predicates than whites, this is not explained by racial differences in the commission

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[74] Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 Fed. Sent'g Rep. 311, 313 fig.1 (2013).

[75] *Fifteen Year Review*, *supra* note 27, at 131; *see also* Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1686-87 (2012).

[76] *Fifteen Year Review*, *supra* note, 27 at 114.

[77] App. at 9a.

of such offenses. Blacks comprised about 13% of the U.S. population in 2010.[78] They reported using an illicit drug in the past year at about the same rate as whites (16.8% and 15.3%, respectively[79]), and "there is also little evidence, when all drug types are considered, that blacks sell drugs more often than whites."[80] Blacks are about half as likely as whites to have a firearm in their homes.[81] Nonetheless, African Americans accounted for 39% of drug sale arrests and 41% of weapon possession arrests in 2010.[82]

The Career Offender Guideline's disproportionate impact on black defendants arises in large part from disparate state and local policing practices that result in black defendants having prior convictions for drug

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[78] U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2015*, *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPSR6H&prodType=table.

[79] Substance Abuse & Mental Health Servs. Admin., Results from the 2010 National Survey on Drug Use and Health, tbl. 1.19B, *available at* http://www.samhsa.gov/data/sites/default/files/NSDUHNationalFindingsResults2010-web/2k10ResultsTables/NSDUHTables2010R/HTM/Sect1peTabs1to46.htm.

[80] Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 60 (Jeremy Travis *et al.* eds., 2014).

[81] Rich Morin, Pew Research Center, *The Demographics and Politics of Gun-Owning Households* (July 15, 2014), www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households.

[82] Arrest rates for 2010 were obtained from the Bureau of Justice Statistics, Arrest Data Analysis Tool, *available at* http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm#.

trafficking and many "crimes of violence" that they would otherwise not have, and that they would not have if they were white. This is also true of instant federal offenses, as many federal prosecutions originate with arrests by state and local police.[83] According to the National Research Council, extreme racial disparities in imprisonment have been "partly caused and substantially exacerbated" by police arrest practices associated with the "war on drugs," including racial profiling, and harsh sentencing laws and guidelines that apply disproportionately to black people, including three-strikes laws.[84]

Research from across the country shows that black drivers and pedestrians are stopped, frisked, searched and arrested far in excess of their portion of the population or their share of criminality. The use of racial profiling to stop, question and search black and brown drivers in an effort to find drugs, guns and cash originated in 1984 with "Operation Pipeline," a key initiative of the "war on drugs." Endorsed and financed by the Drug Enforcement Administration, thousands of state and local police officers were trained in its methods.[85] The practice became institutionalized in police departments across the country,

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[83] John F. Stinneford, *Subsidiarity, Federalism and Federal Prosecution of Street Crime*, 2 J. Catholic Soc. Thought 495, 507-09 (2005).

[84] Nat'l Research Council, *supra* note 80, at 70-71, 73, 91, 102-129.

[85] *See* Gary Webb, *Driving While Black: Tracking Unspoken Law-Enforcement Racism*, Esquire, Jan. 29, 2007, www.esquire.com/news-politics/a1223/driving-while-black-0499 (originally published as *DWB*, Esquire, Apr. 1999, at 118–127); *see also* David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Race Profiling*, N.Y. Times, Nov. 29, 2000, at A1.

and was adopted in some cities to stop and frisk pedestrians.[86]

The practice of targeting minorities for investigatory stops has been defended as an effective and efficient policing strategy on the theory that minorities are more likely to commit crime.[87] But this theory has been tested and disproved in studies across the nation. These studies, which analyze data recorded by police officers[88] and control for crime rates and other variables, consistently find that minorities are stopped, frisked, searched and arrested at disproportionately high rates, but that drugs, weapons and other contraband are found at significantly lower rates in frisks and searches of minorities than of whites.

For example, in Los Angeles, analysis of field data reports on pedestrian and motor vehicle stops from July 2003 through June 2004 revealed that the black stop rate per 10,000 residents was 3,400 stops higher

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[86] *See, e.g.*, Charles Epp & Steven Maynard-Moody, *Driving While Black*, Wash. Monthly, Jan. 1, 2014, at 14.

[87] *See* Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics during Traffic Stops with Police: Results from a National Survey*, 21 Just. Q. 49, 50 (2004); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 294 (1999).

[88] In response to public attention and lawsuits, police in some jurisdictions are required to record the details of traffic and (sometimes) pedestrian stops, including the reason for the stop, the race of the person stopped, and (in some jurisdictions) the outcome. *See* Frank R. Baumgartner *et al.*, *Targeting Young Men of Color for Search and Arrest during Traffic Stops: Evidence from North Carolina, 2002–2013* at 5, Politics, Groups, & Identities (2016), http://dx.doi.org/10.1080/21565503.2016.1160413; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risk of Driving While Black*, N.Y. Times, Oct. 25, 2015, at A1.

than the white stop rate, after controlling for crime rates in the reporting districts and a range of other variables.[89] Stopped blacks were 127% more likely to be frisked, 76% more likely to be searched, and 29% more likely to be arrested than stopped whites.[90] But frisked blacks were 42% less likely than frisked whites to be found with weapons, 25% less likely to be found with drugs, and 33% less likely to be found with other contraband. Searched blacks were 37% less likely than searched whites to be found with weapons, 24% less likely to be found with drugs, and 25% less likely to be found with other contraband.[91] The researchers concluded that it was thus "implausible that higher frisk and search rates are justified by higher minority criminality,"[92] and that if the same level of justification were used to search minorities and whites, fewer minorities would be searched, or proportionately more whites would be searched.[93]

Similar results are found in New York City. Based on analysis of 4.4 million documented pedestrian stops in New York City from 2004 through 2012, the court in *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013) found that 52 percent of those stopped were black, 31 percent were Hispanic, and 10 percent were white, while the population was 23 percent black,

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[89] Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 5-6 (2008), *available at* http://islandia.law.yale.edu/ayres/Ayres%20LAPD%20Report.pdf.

[90] *Id.* at 27.

[91] *Id.* at 7-8. Similar, but less extreme, results were found for Hispanics.

[92] *Id.* at 27.

[93] *Id.* at 23-24.

29 percent Hispanic, and 33 percent white.[94] A weapon was seized in one of every 71 stops of whites, 100 stops of blacks, and 91 stops of Hispanics; other contraband, including illegal drugs and stolen property, was seized in one of every 43 stops of whites, 56 stops of blacks, and 59 stops of Hispanics.[95] When the total number of stops declined by 22 percent in 2012, the disparity in "hit rates" was even more pronounced: a weapon was found in one of every 49 stops of whites, while it took 93 stops of blacks and 71 stops of Hispanics to find a weapon.[96] The court found that blacks and Hispanics were more likely to be stopped above and beyond the crime rate in a given area,[97] and that "blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites."[98]

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[94] *Floyd v. City of New York*, 959 F.Supp.2d 540, 559 (S.D.N.Y. 2013).

[95] *Id.*

[96] Office of the Public Advocate, City of New York, *Stop and Frisk and the Urgent Need for Meaningful Reforms* 1 (2013), *available at* http://archive.advocate.nyc.gov/stop-frisk.

[97] *Floyd*, 959 F.Supp.2d at 560.

[98] *Id.*

Data from North Carolina,[99] Kansas City,[100] Connecticut,[101] Illinois,[102] San Francisco,[103] and a national survey,[104] point to the same conclusion: Blacks, and to a lesser extent Hispanics, are disproportionately stopped, frisked, searched and arrested, but are found with contraband significantly less often than whites. Because police find contraband where they look for it, blacks are arrested and convicted in disproportionate numbers relative to similarly situated whites,[105] and "[p]olice profiling results in many more arrests of black people than would otherwise occur."[106] While some police departments are beginning to institute reforms,[107] even in "most of the states that monitor traffic stops most closely, officials

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[99] Baumgartner *et al.*, *supra* note 88.

[100] Epp & Maynard-Moody, *supra* note 86, at 14.

[101] Matthew B. Ross *et al.*, Inst. for Mun. & Reg'l Policy, Cent. Conn. State Univ., *State of Connecticut: Traffic Stop Data Analysis and Findings* iv, 73, 95, 108, 134, 161, 175 (2016), *available at* www.ccsu.edu/imrp/Publicatons/Files/May%202016%20Connecticut%20Racial%20Profiling%20Report.pdf.

[102] LaFraniere & Lehren, *supra* note 88.

[103] Office of the San Francisco Dist. Att'y, *Report of the Blue Ribbon Panel on Transparency, Accountability, & Fairness in Law Enforcement* 29-31 (2016), *available at* http://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf.

[104] Engel & Calnon, *supra* note 87.

[105] Harris, *supra* note 87, at 297, 301-02.

[106] Nat'l Research Council, *supra* note 80, at 91 n.16.

[107] *See* All Things Considered: *To Reduce Bias, Some Police Departments Are Rethinking Traffic Stops* (NPR radio broadcast July 25, 2016), *transcript available at* http://www.npr.org/templates/transcript/transcript.php?storyId=486945181.

acknowledge that this close attention has not had a discernible effect."[108]

Another contributing factor is that in poor urban areas, the purchase and consumption of illegal drugs, and incidents like drunkenness and domestic disturbances are more likely to take place in public, whereas in suburban and more affluent urban areas, these activities are more likely to take place in private.[109] Residents of poor urban areas are thus "more exposed to police scrutiny and are more likely to be arrested than people residing in the suburbs or in wealthier urban neighborhoods."[110] However, there is evidence that police overlook criminality by whites when they see it. A study of indoor and outdoor drug markets in Seattle found that blacks were overrepresented in both outdoor and indoor arrests, with arrests of suspected black dealers outnumbering arrests of suspected white dealers by nearly two to one, and that significant outdoor drug activity that overwhelmingly involved whites appeared to be "largely invisible" to the police.[111]

The upshot is that African Americans appear in federal court with career offender predicates that they would likely not have if they were white. And it is reasonable to assume that many offenses that were

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[108] LaFraniere & Lehren, *supra* note 88.

[109] Nat'l Research Council, *supra* note 80, at 128.

[110] *Id.*; *see also Fifteen Year Review*, *supra* note 27, at 134 (noting the "relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods").

[111] Katherine Beckett *et al.*, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 Criminology 105, 119, 122, 129-30 (2006).

"crimes of violence" only under the residual clause, such as resisting arrest,[112] carrying a concealed weapon, possessing certain kinds of weapons, driving under the influence, vehicular flight, and failure to stop for a blue light, also have resulted from greater scrutiny and more frequent contact with police.

B. The Career Offender Guideline Calls for Punishment That Is Excessive to Advance Any Purpose of Sentencing.

The only purposes of sentencing that the Career Offender Guideline might have been thought to promote are deterrence and incapacitation. But it is now well-established that increasing the severity of punishment does little, if anything, to deter crime.[113]

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[112] Studies show that blacks are arrested for the sole charge of resisting arrest significantly more often than whites. *See* Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* 65 (2015) (finding that the sole reason for 14 arrests following a traffic stop was resisting arrest and that the person arrested in each instance was black); *id.* at 67 (African Americans comprise 67% of Ferguson's population, but account for 92% of charges for resisting arrest); LaFraniere & Lehren, *supra* note 88 (traffic stop data from Greensboro, North Carolina, showed that more than four times as many blacks as whites were arrested on the sole charge of "resisting, obstructing or delaying an officer"); Emily Green, *Huge Racial Disparities in S.F Arrest Citations*, S.F. Chron., Apr. 29, 2015, at Metro A1 ("African Americans in San Francisco are cited for resisting arrest at a rate eight times greater than whites even when serious crimes are not involved, according to statistics drawn from court records.").

[113] *See* Nat'l Research Council, *supra* note 80 at 134-40, 337 (examining empirical studies and concluding that because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are "not an effective deterrent"); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199,

As to the need for incapacitation, the Commission has consistently found that the ordinary criminal history rules are a good measure of the risk of recidivism,[114] but that the Career Offender Guideline is not.

In its initial evaluation of the predictive accuracy of the criminal history rules, the Commission found that each increase in the criminal history category (CHC) was associated with a statistically significant increase in the risk of recidivism, *except* the increase from CHC V to CHC VI. This was because "offenders sentenced under the career offender guideline (§4B1.1) and the armed career criminal guideline (§4B1.4) can be assigned to criminal history category VI, even if they have fewer than 13 criminal history points."[115] When recidivism was measured against criminal history points alone, all categories were significantly different from one another.[116] In a more recent evaluation, the Commission found that the rates of re-arrest and reconviction for career offenders and armed career criminals together were significantly lower than those rates for offenders in CHCs IV, V, and VI.[117]

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202 (2013) ("[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis.").

[114] *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 8 (2004); U.S. Sent'g. Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18 (2016); *Career Offender Report*, *supra* note 3, at 6.

[115] *Measuring Recidivism*, *supra* note 114, at 9.

[116] *Id.*

[117] *See Comprehensive Overview*, *supra* note 114, at app. A-1, Rearrest Rates Across Selected Variables (Mar. 2016) (69.5% rearrest rate for "Career Offender/Armed Career Criminal," 74.7% for Criminal History Category IV, 77.8% for Criminal History Category V. and 80.1% for Criminal History Category VI)

The Commission has thus concluded that the automatic assignment of offenders to CHC VI under the Career Offender Guideline is not justified by their recidivism risk.[118] This makes sense, given the blanket, dramatic increases required by the Career Offender Guideline for prior offenses that meet its expansive definitions. The ordinary criminal history rules treat prior offenses more incrementally, and account for relevant differences among prior offenses, such as sentence duration, recency, and other details.[119]

Moreover, most career offenders not only are assigned to the highest criminal history category, but receive an increase in offense level tied to the statutory maximum. Because the offense level *prior* to this adjustment is designed to reflect the seriousness of the instant offense,[120] this increase can be justified only for the purpose of incapacitation. Yet, the Commission has found "no apparent relationship" between offense levels and recidivism risk.[121]

To date, the Commission has focused on how the inclusion of drug offenses as career offender predicates

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id. app. A-2, Reconviction Rates Across Selected Variables, (47.6% reconviction rate for "Career Offender/Armed Career Criminal," 51.6% for Criminal History Category IV, 56.6% for Criminal History Category V, and 59.3% for Criminal History Category VI).

[118] *Measuring Recidivism*, *supra* note 114, at 9.

[119] *See, e.g.*, U.S.S.G. §§4A1.1(a)-(c), 4A1.2(c)-(e).

[120] Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 62-67 (2003).

[121] *Measuring Recidivism*, *supra* note 114, at 13.

fails to identify defendants most in need of incapacitation. The Fifteen Year Review found that the recidivism rate for drug defendants who qualified for career offender status based on prior drug convictions was lower than other defendants in CHC VI.[122] Similarly, the Commission's most recent report concludes that the recidivism rate of career offenders qualifying based on drug offenses was similar to non-career offenders.[123]

The Commission has not addressed the rates or kinds of recidivism for offenses that qualify as "crimes of violence" under the residual clause. Its most recent study included all federal offenders who were released from prison or placed on probation in 2005, and 1,998 career offenders who were released from prison from 2004 through 2006. Based on the "instant offense" (for which they had served the federal prison sentence) and "prior arrests" (prior to the instant offense), career offenders were divided into three "pathways": (1) "drug trafficking only" if the instant offense was drug trafficking and they had two or more prior arrests for drug trafficking and no prior arrests for "violent offenses," (2) "mixed" if they had at least one "violent" and one drug trafficking event as either the instant offense or a prior arrest, or (3) "violent only" if the instant offense was "violent" and they had two or more prior arrests for "violent offenses" and no prior arrests for drug trafficking.[124] "Prior arrests," and "re-arrests" over an eight-year post-release follow-up period, were obtained from FBI RAP sheets.

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[122] *Fifteen Year Review*, *supra* note 27, at 134.

[123] *Career Offender Report*, *supra* note 3, at 40.

[124] *Id.* at 38-39.

These "pathways," however, were not based on any legal definition of "crime of violence," after *Begay*, after *Johnson*, or under the Commission's post-*Johnson* definition. Instead, an instant offense or arrest was counted as "violent" based on the Bureau of Justice Statistics' "violent offense" category,[125] which includes both first degree murder and vehicular manslaughter, forcible rape and statutory rape, robbery by force and purse snatching, aggravated assault and simple assault, and a variety of "other" offenses including illegal abortion and cruelty towards a child or wife.[126] As a result, the "mixed" and "violent only" categories include people who have never been arrested for a "crime of violence" as defined after *Begay*, after *Johnson*, or under the Commission's post-*Johnson* definition.

Notably, a number of offenses that have at some point been "crimes of violence" under the residual clause, such as escape, burglary, pickpocketing, motor vehicle theft, DUI, and unlawful possession of a weapon, were *not* counted as "violent."[127] Thus, the "drug trafficking only" category–with the lowest re-arrest rate[128]–includes people who *have* been arrested for offenses that were "crimes of violence" under the residual clause. Because the Bureau of Justice Statistics does not categorize weapons possession as violent, offenders like Mr. Beckles who were part of the study

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[125] *Id.* at 39.

[126] Matthew R. Durose *et al.*, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, at 22 (2014) (providing BJS definitions of "violent offenses").

[127] *Id.* at 22-23.

[128] *Career Offender Report*, *supra* note 3, at 40.

were "drug trafficking only" offenders, with the lowest recidivism rate.

Other aspects of the report are worth noting. The Commission used a broad definition of recidivism, defined as any re-arrest, including for alleged violations of probation or supervised release, and regardless of whether offenders were convicted of any crime.[129] Strikingly, the Commission did not report how many career offenders were in any of the three pathways, or the number or types of events for which they were arrested.[130] It did report that assault (including simple assault) was the "most frequent" "most serious" post-release event for both career offenders (24.9% of all recidivating events) and non-career offenders (23.3%).[131] In a previous study, the Commission found that violation of probation or supervised release conditions (38.3%) was the most common reason for re-arrest among offenders in CHC VI, followed by larceny (14.9%).[132] Re-arrest for a "serious violent felony"—homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic

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[129] *Id.* at 39.

[130] The assertion in the "Current Sentencing Practices" part of the report, *id.* at 27-37, that 73.3% of career offenders sentenced in 2014 had at least one "violent offense" (60.6% "mixed," 12.7% "violent only"), *id.* at 28, is misleading. The Commission divided a sample of 449 defendants sentenced in 2014 into its three "pathways" based on all "criminal history events" listed in presentence reports, and counted them as "violent" based on a different list including many offenses that would not be "crimes of violence" under any past or present legal definition. *Id.* at 27 & n.39, 28 n.41. If legal definitions had been used, the "mixed" category would shrink significantly and the "drugs only" category would grow accordingly.

[131] *Id.* at 39-40.

[132] *Measuring Recidivism*, *supra* note 114, at 32 Ex.13.

violence, and weapons offenses—was relatively rare (12.5% of all recidivating events, committed by 7% of all CHC VI offenders).[133] Further, other Commission reports provide data on both re-arrest and re-conviction, and it makes a big difference. For example, the rate of re-arrest for those with 12 criminal history points like Mr. Beckles was 48.7%, but the rate of re-conviction was 14.0%.[134]

CONCLUSION

Mr. Beckles was deemed a career offender based on his offense of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g), an unloaded sawed-off shotgun, and two prior state convictions for possession with intent to distribute cocaine. His case is in many ways typical of those subject to the harsh punishment delivered by the Career Offender Guideline. He was abandoned by his parents at age five, began using drugs and having legal problems at a young age, and was unable to read or write at the time of sentencing at age 24. J.A. 21. His prior record consisted of five state convictions for low-level possession with intent to sell cocaine, marijuana possession offenses for which adjudication was withheld, and a conviction for burglary of an unoccupied structure. *Id.* His instant offense arose from being approached by a Miami police detective who had no suspicion that he had committed a crime. The detective simply saw Mr. Beckles, a young black man, outside of a public housing project, decided to question him about where he lived, and exited his vehicle. Trial Tr. at 16, 25-26. Mr. Beckles fled to his girlfriend's apartment, with the detective in

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[133] *Id.* at 21 Ex.2 (55.2% were re-arrested); *id.* at 32 Ex.13 (12.5% were for "serious violent offenses").

[134] *Id.* at 23 Ex.4.

pursuit. *Id.* 17. After removing Mr. Beckles from the apartment and placing him in his police car, the detective asked the girlfriend if there were any drugs or guns in the apartment. *Id.* at 18-19. She said there was a gun, but the detective was unable to find it, so he brought Mr. Beckles back into the apartment, whereupon Mr. Beckles showed him the gun hidden beneath the mattress. *Id.* at 20. The gun was unloaded, and there was no ammunition in the apartment. *Id.* at 33.

The only career Mr. Beckles had was selling and using drugs. Like many others still in prison, he is serving a sentence under the Career Offender Guideline that the judge "*would not*" have imposed "but for the minimum offense levels assigned by the Sentencing Commission." J.A. 149. Their only hope of relief from its disproportionate and needless severity is for the Court to hold that *Johnson* applies retroactively to Career Offender Guideline cases.

Respectfully submitted,

DONNA COLTHARP
SARAH GANNETT
DANIEL KAPLAN
Co Chairs
BRETT SWEITZER
Member
Amicus Committee
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS

AMY BARON-EVANS
Counsel of Record
JENNIFER NILES COFFIN
FEDERAL DEFENDERS
NATIONAL SENTENCING
RESOURCE COUNSEL
51 Sleeper St., 5th Floor
Boston, MA 02210
(617) 391-2253
abaronevans@gmail.com

APPENDIX

APPENDIX A

CAREER OFFENDER DATA ANALYSES

Data Source and Methodology

The data used for these analyses were extracted from the U.S. Sentencing Commission's Fiscal Year 2014 Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project, Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission.[1] Although these particular analyses have not been performed or published by the Commission, the underlying data are the same as the data used in the Commission's annual Sourcebook of Federal Sentencing Statistics. The data are publicly available at the Commission's website.[2] Using standard statistical software, such as SAS or SPSS, the Individual Offender Monitoring Datafiles can be used to perform a wide variety of analyses and generate tables and graphs beyond those published by the Commission.

Percentages are rounded to the nearest percent, or to the nearest tenth in cases of one percent or less.

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[1] For a description of the Datafiles, *see* U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* app. D at 1 (2004).

[2] *See* Commission Datafiles, http://www.ussc.gov/research-and-publications/commission-datafiles.

I. Guideline Minimum, Average Sentence Imposed, Outside-Guideline Rates for Non-Career Offenders and Career Offenders By Instant Offense of Conviction[3]

For ease of reference, the results described below are collected in the following chart:

Instant Offense Type	All Major Offense Types		Drug Trafficking		Crimes of Violence		Firearms	
	Career Offender	Non-Career Offender	Career Offender	Non-Career Offender	Career Offender	Non-Career Offender	Career Offender	Non-Career Offender
Average Guideline Minimum	205 months	82 months	204 months	83 months	198 months	67 months	241 months	66 months
Average Sentence Imposed	149 months	66 months	138 months	61 months	176 months	70 months	216 months	74 months
Above Range	0.8%	2%	0.5%	1%	2.5%	4.2%	1.6%	4%
Below Range	73%	62%	77%	70%	57%	43%	64%	43%
	GS 46% NGS 26%	GS 38% NGS 24%	GS 49% NGS 28%	GS 46% NGS 24%	GS 35% NGS 22%	GS 20% NGS 23%	GS 40% NGS 24%	GS 19% NGS 23%

GS: Government-sponsored NGS: Non-government sponsored

A. The Eight Major Offense Types

Considering only the 2,186 career offenders and 28,770 non-career offenders convicted of the eight major offense types found among career offenders (murder, sexual abuse, assault, robbery, arson, drug trafficking, firearms, racketeering/extortion[4]), the average guideline minimum was 205 months for career offenders, and 82 months for non-career offenders.

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[3] The Commission Datafiles contain no information regarding the types of prior convictions upon which career offender status was based.

[4] *See* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl.22.

The average sentence imposed was 149 months for career offenders, and 66 months for non-career offenders.

Sentences above the guideline range were imposed on 0.8 percent of career offenders, and on 2 percent of non-career offenders.

Sentences below the guideline range were imposed on 73 percent of career offenders (46 percent government sponsored and 26 percent not), and on 62 percent of non-career offenders (38 percent government sponsored and 24 percent not).

B. Drug Trafficking

Of the offenders for whom the Commission received complete information in FY2014, 21,257 offenders were sentenced primarily under the drug guidelines.[5] Of these, 1,702 were classified as career offenders, and 19,555 were not.

The average guideline minimum was 205 months for career offenders, and 83 months for non-career offenders.

The average sentence imposed was 138 months for career offenders, and 61 months for non-career offenders.

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[5] The primary sentencing guidelines are §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). These are the offenders described further in the Commission's 2014 Sourcebook of Federal Sentencing Statistics, tbls.33-45.

Sentences above the guideline range were imposed on 0.5 percent of career offenders, and on 1.0 percent of non-career offenders.

Sentences below the guideline range were imposed on 77 percent of career offenders (49 percent government sponsored and 28 percent not) and on 70 percent of non-career offenders (46 percent government sponsored and 24 percent not).

C. Crimes of Violence

Of the offenders for whom the Commission received complete information in FY2014, 9,668 offenders were convicted primarily under statutes for assault, robbery, firearms offenses, and racketeering/extortion.[6] Of these, 519 were classified as career offenders,[7] and 9,149 were not. The 519 career offenders are 98 percent of career offenders convicted of a crime of violence.

The average guideline minimum was 198 months for career offenders, and 67 months for non-career offenders.

The average sentence imposed was 176 months for career offenders, and 70 months for non-career offenders.[8]

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[6] These are the offenders categorized in these "primary offense categories" in the Commission's 2014 Sourcebook of Federal Sentencing Statistics, tbl.13.

[7] *See* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl.22.

[8] For non-career offenders, the sentence imposed is higher than the guideline minimum due to mandatory minimums that in some cases trump the guideline range.

Sentences above the guideline range were imposed on 2.5 percent of career offenders, and on 4.2 percent of non-career offenders.

Sentences below the guideline range were imposed on 57 percent of career offenders (35 percent government sponsored and 22 percent not), and on 43 percent of non-career offenders (20 percent government sponsored and 23 percent not).

D. Firearms

Of the offenders for whom the Commission received complete information in FY2014, 7,419 offenders were convicted of a firearms primary offense.[9] Of these, 254 were classified as career offenders, and 7,165 were not.

The average guideline minimum was 241 months for career offenders, and 66 months for non-career offenders.

The average sentence imposed was 216 months for career offenders, and 74 months for non-career offenders.[10]

Sentences above the guideline range were imposed on 1.6 percent of career offenders, and on 4.0 percent of non-career offenders.

Sentences below the guideline range were imposed on 64 percent of career offenders (40 percent government sponsored and 24 percent not), and on 43 percent of non-career offenders (19 percent government sponsored and 23 percent not).

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[9] These are offenders with a "primary offense category" of firearms in the Commission's 2014 *Sourcebook of Federal Sentencing Statistics*, tbls.13, 22.

[10] For non-career offenders, the sentence imposed is higher than the guideline minimum due to mandatory minimums that in some cases trump the guideline range.

II. Percentage of Non-Career Offenders Who Received Sentences as High as the Guideline Minimum for Comparable Career Offenders

For ease of reference, the results described below are collected in the following chart:

Non-Career Offenders Who Received Sentences As High As the Career Offender Guideline Minimum	
Drug Trafficking + Crimes of Violence	1.2 percent
Drug Trafficking	0.5 percent
Crimes of Violence	2.8 percent
Firearms	0.9 percent

Analyses were performed to determine how often non-career offenders received upward departures or variances that increased the sentence imposed to a level at least as high as the guideline minimum for comparable career offenders.

Offenders were divided into comparable groups based on types of instant offenses and the cells of the Sentencing Table they were in prior to any upward departure or variance or any adjustment for career offender status. For example, non-career offenders with a guideline minimum of 57 months were compared to career offenders whose guideline minimum was also 57 months prior to the Chapter Four enhancement for career offender status. Final sentences for the non-career offenders were compared to the lowest minimum of the guideline range applicable to the career offenders following the career offender enhancement.

A. Drug Trafficking

The analyses were performed on the 192 non-career offenders who were sentenced above the guideline range, and the 1,552 career offenders whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than the lowest career offenders' guideline minimum in 111 cases. This means that in just 0.5 percent of drug cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable drug offenders who did receive career offender status.

B. Crimes of Violence

The analyses were performed using the 385 non-career offenders convicted primarily under statutes for assault, robbery, firearms offenses, and racketeering/ extortion who were sentenced above the guideline range, and the 456 career offenders convicted of those same offense types whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than career offenders' guideline minimum in 271 cases. This means that in just 2.8 percent of these types of cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable offenders who did receive career offender status.

C. Drug Trafficking and Crimes of Violence

The analyses were performed using the 577 non-career offenders in the offense types above who were sentenced above the guideline range, and the 2,008 career offenders in those same offense types whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than the lowest career offenders' guideline minimum in 382 cases. This means that in just 1.2 percent of these types of cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable offenders who did receive career offender status.

D. Firearms

The analyses were performed using the 284 non-career firearms offenders who were sentenced above the guideline range, and the 207 firearms career offenders whose career offender status increased their guideline range.

Sentences for non-career offenders were the same as or greater than career offenders' guideline minimum in 70 cases. This means that in just 0.9 percent of firearms cases, offenders who did not receive career offender status received sentences at least as high as the lowest guideline minimum for comparable offenders who did receive career offender status.

III. Race/Ethnicity of Career Offenders and Non-Career Offenders In Eight Most Common Career Offender Offense Types

Total Sentenced for Eight Most Common Offenses*

Race/Ethnicity	All Sentenced in FYs 1992-2014
White	29.2%
Black	32.7%
Hispanic	34.2%
Other	3.9%

All Sentenced in Fiscal Years 1992-2014 and Those Likely Still in Prison*

Career Offender Status	Race/Ethnicity	All Sentenced in FYs 1992-2014	Likely Still in Prison 2016
Career offender	White	22.4%	19.3%
	Black	61.6%	65.8%
	Hispanic	14.3%	13.3%
	Other	1.7%	1.6%
Non-career offender	White	29.6%	23.5%
	Black	30.9%	39.4%
	Hispanic	35.4%	33.6%
	Other	4.1%	3.6%

* Cases with full information; Data before 1992 not available; Includes offense types: murder, sexual assault, assault, robbery, arson, drug trafficking, firearms, racketeering/extortion, *see* U.S. Sent'g Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, tbl.22.

IV Number of Prisoners Seeking Collateral Review

Data from FY1992 (the earliest date for which the Commission has made data available) through FY2014 (the year before *Johnson v. United States*, 135 S. Ct. 2551 (2015) was decided) were used to estimate the number of offenders sentenced under the career offender guideline, and the number of those offenders

likely to remain in prison, by district and nationwide. The estimate of the number likely to remain in prison is necessarily imprecise, because it is based only on information available at the time of sentencing, including estimates of the prison time likely to be served by offenders, assuming they receive full good time credits. Information on re-sentencings, other possible post-sentencing reductions, and prison conduct that may affect good time credits is not available. Publicly available data also do not indicate the precise date of sentencing, only the fiscal year. Offenders who would be more than 70 years old today are excluded from the estimate.

Based on this information, about 39,953 offenders were sentenced under the career offender guideline from FY1992 through FY2014, and about 23,546 of those offenders are likely still in prison.

The number of prisoners who may be eligible for relief if *Johnson* is held to be retroactive is necessarily lower than the number of career offenders likely still in prison. The majority of career offender predicates are "controlled substance offenses,"[11] and many "crimes of violence" qualify under the enumerated offense clause or the elements clause.

After the statute of limitations passed, Federal Defender Offices were asked to report the number of

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[11] The Commission's Datafiles do not contain information regarding the types of prior convictions upon which career offender status was based, but the most common "criminal history event" for career offenders sentenced in fiscal year 2014 was drug trafficking. *See* U.S. Sent'g Comm'n, *Public Data Briefing: "Crime of Violence" and Related Issues* at slides 17, 19, available http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

28 U.S.C. § 2255 motions they had filed in career offender cases, but only if they had undertaken a thorough effort to file motions for as many people as appeared to be eligible for relief. For each of the responding districts, the number of motions filed was divided by the number of defendants sentenced under the career offender guideline in that district from FY1992 through FY2014 who are likely still in prison. The average was 25.6 percent. Taking 25.6 percent of the 23,546 career offenders likely still in prison nationwide, a maximum of 6,027 motions were filed. This overstates the number of motions filed by Federal Defender Offices, as many offices were unable to file any motions or as many motions as there are prisoners eligible for relief. At the same time, an unknown number of prisoners filed *pro se* motions. Nonetheless, we believe that 6,000 motions is a fair estimate, and likely overstates the number of motions filed, as it is based on data from Federal Defender Offices that filed motions for as many people as appeared to be eligible.

APPENDIX B

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Alabama, Northern
KEVIN BUTLER

Alabama, Middle
CHRISTINE FREEMAN

Alabama, Southern
CARLOS WILLIAMS

Alaska
FRED RICHARD CURTNER

Arizona
JON M. SANDS

Arkansas, Eastern
JENNIFFER MORRIS HORAN

Arkansas, Western
BRUCE EDDY

California, Central
HILARY POTASHNER

California, Eastern
HEATHER ERICA WILLIAMS

California, Northern
STEVEN GARY KALAR

California, Southern
REUBEN CAHN

Colorado
VIRGINIA L. GRADY

Connecticut
TERENCE S. WARD

Delaware
EDSON A. BOSTIC

District of Columbia
A. J. KRAMER

Florida, Middle
DONNA LEE ELM

Florida, Northern
RANDOLPH P. MURRELL

Georgia, Middle
CHRISTINA HUNT

Georgia, Northern
STEPHANIE KEARNS

Guam
JOHN T. GORMAN

Hawaii
PETER C. WOLFF, JR.

Idaho, Central and Northern
ANDREA GEORGE

Idaho, Southern
SAMUEL RICHARD RUBIN

Illinois, Central
THOMAS W PATTON

Illinois, Northern
CAROL BROOK

Illinois, Southern
PHILLIP J. KAVANAUGH

Indiana, Northern
JEROME T. FLYNN

Indiana, Southern
MONICA FOSTER

Iowa, Northern and Southern
JAMES F. WHALEN

Kansas
MELODY BRANNON

Kentucky, Western
SCOTT WENDELSDORF

Louisiana, Eastern
CLAUDE KELLY

Louisiana, Middle and Western
REBECCA L. HUDSMITH

Maine
DAVID BENEMAN

Maryland
JAMES WYDA

Massachusetts
MIRIAM CONRAD

Michigan, Eastern
MIRIAM L. SIEFER

Michigan, Western
SHARON TUREK

Minnesota
KATHERIAN D. ROE

Mississippi, Northern and Southern
SAMUEL DENNIS JOINER

Missouri, Eastern
LEE LAWLESS

Missouri, Western
MADELEINE CARDARELLA

Montana
ANTHONY R. GALLAGHER

Nebraska
DAVID STICKMAN

Nevada
RENE VALLADARES

New Hampshire
MIRIAM CONRAD

New Jersey
RICHARD COUGHLIN

New Mexico
STEPHEN P. MCCUE

New York, Eastern and Southern
DAVID PATTON

New York, Northern
LISA PEEBLES

New York, Western
MARIANNE MARIANO

North Carolina, Eastern
THOMAS P. MCNAMARA

North Carolina, Middle
LOUIS C. ALLEN III

North Carolina, Western
ROSS RICHARDSON

North and South Dakota
NEIL FULTON

Ohio, Northern
STEPHEN C. NEWMAN

Ohio, Southern
DEBORAH WILLIAMS

Oklahoma, Eastern and Northern
JULIA L. O'CONNELL

Oklahoma, Western
SUSAN M. OTTO

Oregon
LISA HAY

Pennsylvania, Eastern
LEIGH SKIPPER

Pennsylvania, Middle
JAMES V. WADE

Pennsylvania, Western
LISA B. FREELAND

Puerto Rico
ERIC A. VOS

Rhode Island
MIRIAM CONRAD

South Carolina
PARKS NOLAN SMALL

Tennessee, Eastern
ELIZABETH FORD

Tennessee, Middle
HENRY A. MARTIN

Tennessee, Western
DORIS RANDLE-HOLT

Texas, Eastern
G. PATRICK BLACK

Texas, Northern
JASON D. HAWKINS

Texas, Southern
MARJORIE A. MEYERS

Texas, Western
MAUREEN SCOTT FRANCO

Utah
KATHRYN N. NESTER

Vermont
MICHAEL L. DESAUTELS

Virgin Islands
OMODARE JUPITER

Virginia, Eastern
GEREMY KAMENS

Virginia, Western
LARRY W. SHELTON

Washington, Eastern
ANDREA GEORGE

Washington, Western
MICHAEL FILIPOVIC

West Virginia, Northern
BRIAN J. KORNBRATH

West Virginia, Southern
CHRISTIAN M. CAPECE

Wisconsin, Eastern and Western
DANIEL STILLER

Wyoming
VIRGINIA L. GRADY